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Durham School Services, LP and International Brotherhood of Teamsters, Local 991, Petitioner. Case 15–RC–096096

October 20, 2014

ORDER DENYING MOTION FOR RECONSIDERATION

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND SCHIFFER

On May 9, 2014, the National Labor Relations Board, by a three-member panel, issued a Decision and Certification of Representative in this case, reported at 360 NLRB No. 108. Pursuant to a Stipulated Election Agreement signed by the parties and approved by the Regional Director on January 24, 2013, the election in this case was conducted on February 22, 2013. The Employer filed three timely objections.¹ In Objection 3, the Employer argued that in light of the decision of the United States Court of Appeals for the District of Columbia Circuit in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), the Region lacked the authority “to investigate or conduct a hearing on the pending petition in this matter” because the Board lacked a quorum.

Following an administrative investigation, the Regional Director issued a Report and Recommendation on Objections on March 25, 2013. The Regional Director recommended that Objections 1, 2, and 3 be dismissed in their entirety and that a Certification of Representative be issued. Regarding Objection 3, the Regional Director reasoned that (1) the Board did not agree with the decision of the United States Court of Appeals for the District of Columbia Circuit in *Noel Canning*; (2) the Board has a longstanding practice of not acquiescing in adverse decisions by individual courts of appeals in subsequent proceedings involving different parties; and (3) there was a strong public interest in promptly addressing representation disputes. The Employer filed exceptions, and with respect to Objection 3 reiterated that the Region lacked the authority to process the petition because the Board lacked a quorum, and “[w]hen the Board itself is without authority to act, any delegated authority to its regional directors is terminated during the period of incapacity.” Employer’s brief in support of exceptions to report and

¹ Member Miscimarra dissented in part from the Board’s Decision and Certification of Representative. He would have remanded the case for a hearing on Objection 1. He remains of that view, but he agrees with the denial of Respondent’s motion for reconsideration for the reasons expressed in the text.

recommendation on objections at 14–15 (citing *Laurel Baye of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 473 (D.C. Cir. 2009)). The Board’s Decision and Certification of Representative adopted without further comment the Regional Director’s recommendation to overrule Objection 3.

On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), finding that the President lacked the power to make recess appointments to the Board on January 4, 2012. 134 S.Ct. at 2557. On July 16, 2014, the Employer filed this motion for reconsideration, restating its arguments in support of Objection 3 and making additional arguments. Specifically, the Employer contends that the Board lacked a quorum at the time the petition was filed, when the election was held, and when the tally of ballots issued. Based on the decision of the United States Court of Appeals for the District of Columbia Circuit in *Laurel Baye*, supra, the Employer further argues that the Board’s delegation of decisional authority in representation cases to Regional Directors was terminated when the Board lost a quorum, and therefore the election should be set aside and a new election should be directed. The Petitioner filed a response.

At the outset, we observe that the Employer has invoked the administrative mechanism for challenging the representation proceedings set forth in Section 102.65(e)(1) and (2) of the Board’s Rules and Regulations. Those sections provide:

A party to a proceeding may, because of extraordinary circumstances, move after the close of the hearing for reopening of the record, or move after the decision or report for reconsideration, for rehearing, or to reopen the record

. . . .

Any motion for reconsideration or for rehearing pursuant to this paragraph shall be filed within 14 days, or such further period as may be allowed, after the service of the decision or report.

Here, the Employer argues that reconsideration is warranted in light of the decision of the Supreme Court in *Noel Canning* finding that the challenged appointments to the Board were not valid. Absent valid appointments, the Board lacked a quorum at the time of the election and tally of ballots in this matter. Accordingly, the Employer contends that absent a Board quorum, the Regional Director’s delegated authority to conduct representation proceedings ceases to exist.

We note that the Employer's motion suffers from procedural infirmities that potentially preclude review.² Without resolving these potential infirmities, however, and having duly considered the matter, we deny the Employer's motion for reconsideration on the merits.³ Even though the Board lacked a quorum at the time the Regional Director conducted the election, Section 102.178 of the Board's Rules and Regulations provides that "during any period when the Board lacks a quorum normal Agency operations should continue to the greatest extent permitted by law."⁴ In addition, in 1961, the Board delegated decisional authority in representation cases to Regional Directors pursuant to the 1959 amendment of Section 3(b) of the National Labor Relations Act expressly authorizing such a delegation. Pub. L. 86-257, 86th Cong., 1st Sess., § 701(b), 73 Stat. 519, 542; 26 Fed. Reg. 3911 (1961); see *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 142 (1971) (by Section 3(b) Congress allowed the Board to make a delegation of its authority over representation elections to the regional director). This delegation occurred when the Board had a quorum and has never been revoked.

Further, in *New Process Steel v. NLRB*, 560 U.S. 674 (2010), the Supreme Court declined to adopt the District

of Columbia Circuit's view regarding the effect that the lack of a Board quorum has on previous delegations of authority to nonmembers, such as Regional Directors. Although the Supreme Court did not expressly rule on the question, it noted that its "conclusion that the delegee group ceases to exist once there are no longer three Board members to constitute the group *does not cast doubt on the prior delegations of authority to nongroup members*, such as the regional directors or the general counsel." 560 U.S. at 684 fn. 4 (emphasis added). Indeed, since *New Process*, every court of appeals that has considered this issue has held that prior Board delegations of authority to nonmembers do not lapse during a loss of quorum by the Board. See *Kreisberg v. Healthbridge Mgmt., LLC*, 732 F.3d 131, 140 (2d Cir. 2013); *Frankl v. HTH Corp.*, 650 F.3d 1334, 1354 (9th Cir. 2011), cert. denied 132 S.Ct. 1821 (2012); *Osthus v. Whitesell Corp.*, 639 F.3d 841, 844 (8th Cir. 2011); *Overstreet v. El Paso Disposal, LP*, 625 F.3d 844, 853 (5th Cir. 2010). The Supreme Court's decision in *Noel Canning*, *supra*, does not state anything to the contrary.

Finally, this case does not raise a quorum issue regarding the Board panel that certified the Union, because the panel consisted entirely of confirmed members.

The Employer's Motion for Reconsideration is therefore denied.

Dated, Washington, D.C. October 20, 2014

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Nancy Schiffer, Member

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² First, as noted above, the Employer entered into a Stipulated Election Agreement in this case in which it waived the right to a hearing and expressly agreed to the conduct of a secret ballot election. See *ManorCare of Kingston, PA, LLC*, 361 NLRB No. 17, slip op. at 1 fn. 1 (2014). Although the Employer entered into the Agreement the day before the issuance of the D.C. Circuit's opinion in *Noel Canning*, the issue of the constitutional validity of the President's recess appointments was already widely known at the time. Second, the Employer's motion was not filed within 14 days of the Board's Decision and Certification of Representative as prescribed in Sec. 102.65(e)(2). Similarly, assuming (without deciding) that the Supreme Court's decision in *Noel Canning* constitutes "extraordinary circumstances" within the meaning of the Sec. 102.65(e)(1), the Employer's motion was not filed within 14 days of the Supreme Court's decision.

³ We observe that although the Employer has previously raised the delegation argument to the Regional Director and to the Board, neither the Regional Director's report on objections nor the Board's Decision and Certification directly addressed it.

⁴ See also Sec. 102.182 (representation cases should be processed to certification "[t]o the extent practicable").